SIFMA

Securities Industry and Financial Markets Association

June 14, 2010

Via Electronic Mail (veronica_mora@calpers.ca.gov)

Veronica Mora, Regulations Coordinator
California Public Employees' Retirement System
P.O. Box 942707
Sacramento, California 94229-2707

RE: Comments on Proposed Cal. Code of Regulations Section 559-CalPERS' Disclosure of Placement Agent Fees, Gifts and Campaign Contributions

Dear Ms. Mora:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on CalPERS' proposed California Code of Regulation Section 559, *Disclosure of Placement Agent Fees, Gifts and Campaign Contributions* ("Proposed Regulation"). SIFMA is committed to maintaining the integrity of the professional placement agent industry. We support enhanced disclosure of fees and relationships, such as that contained in AB 1584. We believe that relevant and appropriate disclosure provides greater transparency to the investment decision making process of state retirement systems.

SIFMA does, however, seek clarification on three issues raised by the Proposed Regulation. First, Section 559 (b)(1)(c) requires the External Manager or CalPERS Vehicle Manager to provide to CalPERS Staff "a description of any and all compensation of any kind provided or agreed to be provided to a Placement Agent, including the nature, timing, and value thereof." While Section 7513.85(a) of the statute expressly limits the disclosure to "payments to placement agents in connection with system investments," the

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[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

proposed regulation could be interpreted as requiring disclosure of all compensation to placement agents for any and all investments. The CalPERS Placement Agent Information Disclosure Forms suggest that only compensation allocable to a CalPERS investment must be disclosed; this important qualifier should be contained in the actual regulation. Similarly, the disclosure forms require "a written copy of any and all agreements between you and the Placement Agent." While we would again assume that CalPERS is only seeking agreements in connection with its investments, that too needs to be clarified.

Furthermore, SIFMA is concerned with the language in Section 559 (i) and in the Placement Agent Information Disclosure Forms which make the forms and their attachments "public record subject to disclosure under the California Public Records Act." AB 1584, as enacted, requires "a description of any and all compensation of any kind provided, or agreed to be provided, to a placement agent." CalPERS goes further by requiring a copy of the actual written contract between the External Manager and the Placement Agent. These contracts, however, often contain information beyond that relating to compensation (including, potentially, information concerning the structure of a private fund and the fund's marketing strategy), much of which constitutes proprietary and confidential information and/or trade secrets. SIFMA would strongly encourage CalPERS to allow External Managers to submit only the portion of the contract related to compensation, to redact unrelated provisions, or to restrict those contractual provisions that are publicly available under the Public Records Act.

Finally, SIFMA is watching with interest additional placement agent legislation currently being considered by the legislature. AB 1743's subject matter, including a ban on campaign contributions, strict gift restrictions, and relevant definitions, closely relate to the Proposed Regulation. SIFMA would encourage CalPERS to delay finalizing the Proposed Regulation until August, by which time the legislation will have been fully considered. If CalPERS decides to move forward immediately, SIFMA would strongly encourage CalPERS to revisit the regulation if and when AB 1743 is adopted to resolve any potential conflicts between the law and the regulation.

Thank you for your consideration. Please do not hesitate to contact me at 212-313-1311 should you have any questions.

Sincerely,
/S/
Kim Chamberlain
Managing Director and Counsel
State Government Affairs

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June 14, 2010

Veronica Mora
Regulations Coordinator
California Public Employees' Retirement
System
P.O. Box 942707
Sacramento, CA 94229-2707

RE: Comments on Proposed 2 Cal. Code of Regulations Section 559-Disclosure of Placement Agent Fees, Gifts and Campaign Contributions

Dear Ms. Mora:

We are pleased to submit comments on CalPERS' proposed California Code of Regulation Section 559, *Disclosure of Placement Agent Fees, Gifts and Campaign Contributions* ("the Proposed Regulation"). The Proposed Regulation would largely codify CalPERS' current *Statement of Policy for Disclosure of Placement Agent Fees, Gifts, and Campaign Contributions*. One of our investment adviser clients has the following concerns regarding the proposed regulation. Moreover, as a firm that is very familiar with the investment adviser industry through our representation of a large number of investment advisers, we share in their concerns.

Indeed, we appreciate and support CalPERS' measures promoting disclosure and transparency in the investment process and addressing recently alleged abuses. However, with regard to the definition of "placement agent" in the Proposed Regulation, we think that the definition should be consistent with the definition of "placement agent" as will be included in the statute that is ultimately passed and signed into law requiring placement agents to be treated as California state lobbyists (currently AB 1743).[1] A uniform definition for the term "placement agent" as applied to all California retirement systems would avoid confusion and increase compliance.

Therefore, we recommend CalPERS either amend the definition of "placement agent" to cross-reference the new lobbyist statute as enacted, or, in the alternative, delay consideration of the Proposed Regulation until the final disposition of that statute.

Moreover, the new lobbyist statute will impose on placement agents not just a disclosure requirement (similar to the Proposed Regulation), but also substantive restrictions on gifts and entertainment, political contributions and contingent fees. Thus, expanding the definition beyond those covered under the new lobbyist statute is not necessary, while at the same time causing undue confusion and burden. In fact, in-house employees are controlled by the investment adviser and thus exempting them entirely from the definition of placement agent is warranted when the investment adviser is itself accountable to, and regulated by, an agency, such as when the investment adviser is registered with the Securities and Exchange Commission.

Please contact us if you have any questions regarding our comments or if we may provide you with any further information.

Sincerely,

Ki P. Hong
Skadden, Arps, Slate, Meagher & Flom LLP

Patricia M. Zweibel
Skadden, Arps, Slate, Meagher & Flom LLP

cc: Marte Castaños, Senior Staff Counsel

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[1] AB 1743, introduced by Assembly Member Hernandez and most recently amended on May 10, 2010, is available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1701-1750/ab_1743_bill_20100510_amended_asm_v97.pdf.

NVCA
National Venture Capital Association

June 14, 2010

Veronica Mora, Regulations Coordinator
California Public Employees' Retirement System
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BY EMAIL

RE: CalPERS, Notice of Proposed Regulatory Action: Proposed Addition of Section 559. Disclosure of Placement Agent fees, gifts and Campaign Contributions to Article 2 of Chapter 2 of Division 1 of the California Code of Regulations

Dear Ms. Mora:

Background

The National Venture Capital Association (NVCA) is pleased to comment on the above-referenced Rule Proposal. NVCA represents the vast majority of American venture capital under management.[1] A large number of our members, are located in, and provide start-up and development funding for innovative entrepreneurial businesses in California. As you know, public pension funds are important participants in the venture capital community. In fact, since the federal "Prudent Man Rule" allowed public pension funds to invest in venture capital, they have become one of the largest investors in venture capital along with colleges, endowments and private pension funds.

[1] The National Venture Capital Association (NVCA) represents more than 400 venture capital firms – 90% of the venture industry. NVCA's mission is to foster greater understanding of the importance of venture capital to the U.S. economy and support entrepreneurial activity and innovation. The NVCA represents the public policy interests of the venture capital community, strives to maintain high professional standards, provide reliable industry data, sponsor professional development, and facilitate interaction among its members. For more information about the NVCA, please visit www.nvca.org.

CalPERS, in particular, is a highly-valued investor in many venture capital funds. As such, many NVCA member firms fall within the definition of "external managers" under the relevant statute. We support efforts to ensure the integrity of the process by which pension fund investments are placed. It is essential that pension plan investment decisions be based solely on the best interests of fund beneficiaries. We understand the importance of increasing the transparency in the placement process and we also understand that CalPERS has a statutory obligation to establish a policy consistent with recent legislation in this area. Therefore, our comments are intended to assist CalPERS in refining its rule proposal to better accomplish its purpose and to avoid what we see as serious potential unintended consequences of certain aspects of the proposed rules.

Venture capital is a long-term, illiquid investment. Once a new fund is raised the ongoing, year-over-year focus of a venture capital firm is investing in and nurturing start-up businesses. Bringing investment money into a venture capital fund is episodic and short-term. Typically, the most successful venture firm raises a new fund every three or four years. During a finite "fundraising" period a new fund is offered to prospective investors and it is closed once the target level of funding commitments is achieved.

The long-term nature of venture capital investing demands that fund management overhead be kept to the minimum required. Generally speaking, venture capital firms that need episodic placement services contract for them with third parties. The skills and knowledge required to market a new fund to potential investors are not part of a venture capital firm's ongoing staffing needs so very few would consider hiring someone to perform placement functions such as those detailed in the statute and proposed regulations.[2]

Venture capital firms are staffed by people whose skills are essential to the core business of identifying, funding and nurturing new ventures and generating returns for limited partner

[2] Government Code section 7513.8 and the general statement in the proposed regulations, paragraph (a)(6) *Definitions. Placement Agent*, defines "Placement agent" as a person or entity "hired, employed, engaged or retained … as a finder, solicitor, marketer, Consultant, broker or other intermediary to raise money" from CalPERS.

investors ("LPs"). While each fund's "deal partners" have the primary role in selecting and managing fund investments in venture-backed portfolio companies, other employees or partners perform key roles in the management of those investment. Their primary role may be chief financial officer, accountant, receptionist, administrative assistant, human resource specialist, investor relations staff, etc. However, when the firm is engaged in raising a new fund, nearly every employee supports these efforts. Therefore nearly every venture firm employee is involved in marketing a new venture fund to, and soliciting funds from, public pension funds, including CalPERS, during periodic efforts to raise investment commitments for a new fund.

Our comments address our members' concerns with the way "placement agent" is defined, and the way the exception to the definition is discussed in this rule proposal. We fear that it would affect venture capital firm employees who only incidentally assist in periodic fund raising efforts. Our comments highlight what be believe would be the unintended consequences of the rule, as proposed – consequences which we think the Board would find unfortunate. We recommend a more principle-based approach to distinguishing between venture capital firm personnel who participate in efforts to raise new funds and those whose function is primarily to act as a placement agent. We believe that our recommended approach will be more effective for carrying out the purpose of the rule and less burdensome for CalPERS and for venture capital firm employees.

Summary of Comments

The relevant statutory definition of a "placement agent" makes these disclosures applicable to very few venture capital firms since they have no employees who are "hired ... as a finder, solicitor, marketer, consultant, broker or other intermediary to raise money or investment from, or gain access to"[3] a California pubic pension fund like CalPERS. The basic definition in paragraph (a)(6) of the proposed rule mirrors the statutory definition.

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[3] *Id.*

However, the additional language of the proposed regulations, in the last sentence of paragraph (a)(6), which would create an exemption from the definition of placement agent, introduces unnecessary ambiguity and appears to broaden the statutory definition of a "placement agent."

The ambiguity of the exemption, the breadth and personal nature of the disclosures, and the penalties associated with non-compliance present a difficult and unnecessary burden for firms that manage venture capital funds in which CalPERS is a limited partner.

The important distinction which we believe the proposed rules intend to draw between placement agents and other external manager employees can be more effectively described on the basis of whether an employee's primary function – the one for which he or she is <u>hired</u> – is to act as a placement agent.

Furthermore, we have reason to believe that the most successful venture firms will probably consider declining investment funds from CalPERS if they must comply with the proposed rules. Since these "top tier" firms have no difficulty raising investment funds from other sources, it would only be reasonable to forego CalPERS money rather than unnecessarily make public a large number of their employees' sensitive personal financial information.

<u>Detailed Comments</u>

Our concerns are focused on the potential disclosures of confidential personnel information and on disclosure of personal financial information of employees of venture capital firms. The relevant statutory definition of a "placement agent," like the basic definition in the propose rules, limits the application of these disclosure requirements to VC firm employees who are "hired ... as a finder, solicitor, marketer, consultant, broker or other intermediary to raise money or investment from, or gain access to" a California public pension fund like CalPERS.

Under this definition, we believe that only venture capital firms who hire actual internal or external placement agents would be required to make these new disclosures regarding those persons, and with regard to those persons only. This is because, in most venture firms, periodic fund-raising is conducted and supported by firm personnel whose primary role at the firm relates to the management of the assets of the fund, financial reporting and providing information to fund investors. These are essentially support personnel who are not hired to participate in fund placement activities.

Therefore, given the personal nature of some of the disclosures required by the statute and the severe penalties for failure to make the required disclosures, the implementing regulations should make it clear that those who are not "hired" for the placement agent functions described are exempt from the disclosures. One who is <u>hired</u> to perform any of these placement functions has a primary role to act as a placement agent. Those who are involved in marketing or soliciting funds solely as an incident of their primary role should not be considered placement agents. Unfortunately, the language of the proposed exemption from the definition of placement agent creates unnecessary ambiguity and appears to broaden the statutory definition of a "placement agent."

The troubling language in paragraph (a)(6) says that "Placement Agent" does not include any employee "who spends one-third or more of his or her time, during the calendar year, managing the assets controlled by the External Manager." By implication, therefore, one who spends less than one-third of their time "managing assets" could trigger the required disclosures. Venture capital firm employees perform functions that are necessary to managing venture capital funds. However, while they perform critical functions that are integral to management of fund assets, it is very difficult to say that they spend "one-third or more" of the time "managing the assets" of the fund, as the proposed exemption in the rule would seem to require. Indeed, since nearly everyone in a venture capital firm performs myriad tasks in a fast-paced environment, it would be very difficult to determining how any firm employee "spends time" on any particular function with any precision. This problem is amplified by the fact that "managing assets," a key term in the exemption, is not defined and is very hard to define.

Our concerns are heightened by the INITIAL STATEMENT OF REASONS for this proposed rule which suggests a rather cramped interpretation of "managing assets." The INITIAL STATEMENT says that the proposed regulation "includes an exception clarifying that certain personnel with investment decision-making authority are not considered placement agents."[4] Should the exception be restricted to venture firm personnel with "investment decision-making authority," the majority of venture firm employees and even some firm general partners like CFOs could be subject to the required disclosures. Were it the case that firm employees were "placement agents" under the rule, and the firm had, or sought CalPERS as an LP, subparagraph (b)(1)(c) would seem to require disclosure of "any and all compensation of any kind" and subparagraph (b)(1)(e) would require "a copy of any and all agreements between the External Manager and the Placement Agent." This would seem to require public disclosure of not only actual compensation paid to employees, but the very personal information contained in employment agreements regarding benefits, incentives, etc. Surely it is not the intent of the statute or the rule to make public such personal financial information of California residents, among others, who participate in episodic efforts to raise a new fund in addition to their normal duties. Unfortunately, the proposed rules would seem to have that effect. Its consequences have serious ramifications.

The ambiguity of the exemption, the breadth and personal nature of the disclosures, and the penalties associated with non-compliance present a difficult and unnecessary burden for venture capital funds in which CalPERS is a limited partner. Possible penalties for failure to comply with these rules including unilateral rights for CalPERS to withdraw or refuse to meet capital commitments, retroactive forfeitures of management fees, and a five-year bar from additional investments by CalPERS. Furthermore, paragraph (g) of the proposed regulation would require that disclosures be made in any uncertain situations, further raising the risk that a fund manager could be found to have not complied. Therefore, were these proposed rules to be

[4] INITIAL STATEMENT OF REASONS, Adoption if CCR Section 559. Disclosure of Placement Agent Fees, Gifts and Campaign Contributions, 2d page, "*Definition of Placement Agent.*"

enacted, venture firms would face two unpleasant choices: disclose personal financial information of many employees, or decline further involvement with CalPERS.

While many venture capital firms may remain eager to have CalPERS as an LP under any circumstances, the most successful venture firms will probably consider declining investment funds from CalPERS. Since these "top tier" firms have little difficulty raising investment funds from other sources, it would only be reasonable to forego CalPERS money rather than make public a large number of their employees' personal financial information. It is well known that venture capital firms with track records of success over many years or top returns in the most recent years must often turn potential investors away. The burdens that would result from these proposed regulations on both firms and their employees and the severe penalties for non-compliance will almost certainly disadvantage CalPERS' opportunities to invest in the venture capital funds that are most in demand.

We believe these unfortunate consequences can be avoided through a modification of the proposed rule. The key problem is the ambiguity created by the proposed exemptive rule language in paragraph (a)(6) and the statement in the Initial Statement of Reasons regarding that exemption. The important distinction which we believe the proposed rule intends to draw between people who are hired to be CalPERS placement agents and other employees can be more effectively described on the basis of an employee's primary function.

We believe that a simpler distinction based on concepts with which lawyers and regulators are familiar will serve the same purpose more effectively with far fewer burdens on the privacy interests of regular employees. A "placement agent" should not include any person who was hired primarily to perform a function that involve or supports the management of fund assets and whose involvement in raising money or investment funds is incidental to their primary functions. We do not think this principle-based approach to the distinction between a placement agent and other employees will open the door to abuse. Firms will be very aware of hiring someone whose primary role is placement agent. The severity of the penalties and the requirements in paragraph (g) to make disclosures in uncertain situations, will be sufficient motivation for external managers to make the required disclosures regarding an employee whose primary role in the firm is as a "finder, solicitor, marketer, Consultant, broker or intermediary" regarding CalPERS. This is consistent with the goal of the proposed regulations, "to obtain full disclosure of the compensation paid to a placement agent as a result of a CalPERS investment."[5]

Conclusion

NVCA appreciates the opportunity to support CalPERS efforts to enhance the transparency of the placement process in a way that neither burdens venture capital fund employees unduly nor disadvantages CalPERS as an investor in venture capital.

We would be pleased to provide further assistance.

Very truly yours,

Mark G. Heesen
President

[5] Id., Section (b)(1(a) through (b)(1)(h) – *Substance of information in the disclosures.*

FORWARD VENTURES

June 14, 2010

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RE: CalPERS, Notice of Proposed Regulatory Action: Proposed Addition of Section 559. Disclosure of Placement Agent fees, gifts and Campaign Contributions to Article 2 of Chapter 2 of Division 1 of the California Code of Regulations

Dear Ms. Mora,

I am providing comment on behalf of myself and Forward Ventures, a Venture Capital firm founded in 1993 and located in San Diego. Our firm invests in life-science companies, primarily in California.

The proposed regulatory action referenced above regarding disclosure of placement agent activities is of concern to us, because we have current and potential investors that are public pension funds in California. Regulatory actions by CalPERS could become the policy of all or many of the smaller pension funds within the state.

The area of concern is in the proposed definition of personnel who would be reportable as "placement agents". While the statute (Government Code section 7513.85) seems to clearly define a placement agent as someone who <u>is hired as</u> a solicitor or marketer, the proposed CalPERS regulations appear to broaden the definition and make it very unclear as to who must report. Since the proposed penalties for non-compliance are severe, the ambiguity is alarming to any firm that is uncertain of whether the regulations apply to them.

As a Director of Finance of a venture capital firm, I provide due diligence information and correspond with potential investors. I am not a "person or entity hired, employed, engaged or retained by or acting on behalf of an External Manager or on behalf of another Placement Agent as a finder, solicitor, marketer, Consultant, broker or other intermediary to raise money or investments," and therefore clearly not subject to relation as a Placement Agent based on the first part of Section 559 (a)6. However, the second part of definition 6 describing those who are NOT placement agents, i.e., "A Placement Agent shall not include any employee, officer, director, equity holder, partner, member, or trustee of an External Manager who spends one-third or more of his or her time, during a calendar year, managing the assets controlled by the External Manager", creates ambiguity by introducing the almost indefinable term, "managing the assets".

I could argue that the time I spend in tracking our investments, reporting to investors, and much of the general administrative duties that I perform are part of our asset management. Therefore, I spent most of my time managing the assets of the firm, but it would be very hard to quantify. If none of my duties are considered managing assets, because I have no decision-making authority, am I defined a placement agent?

In reviewing the background of the placement agent issue and available documents, it does not appear that the intent of the legislation or even the proposed regulation is to compel venture capital firms to report the compensation of their finance and support staff. It is safe to say that most venture capital employees would vigorously object to disclosure of their personal information. Therefore, I respectfully request the language of the final regulation be clarified to more specifically define Placement Agent. Simply stating that a placement Agent is a person or firm <u>hired or employed for the primary purpose of raising funds</u> would greatly clarify the regulation and align the language of the regulation to the statute. The attempt to define who is not a placement agent only adds confusion.

If our firm did hire a person as an employee whose primary purpose was to market or raise funds, we would not be opposed to disclosing this relationship to CalPERS, if CalPERS were to consider an investment in a Forward Ventures fund.

Thank you for your consideration of these comments. I am happy to discuss the issue further by phone at (858) 964-5015, or email at bailey@forwardventures.

Sincerely,

Kristen Bailey

Kristen Bailey
Director of Finance & Administration

ENTERPRISE
PARTNERS
Venture Capital

June 10, 2010

Veronica Mora, Regulations Coordinator
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RE: CalPERS, Notice of Proposed Regulatory Action: Proposed Addition of Section 559. Disclosure of Placement Agent fees, gifts and Campaign Contributions to Article 2 of Chapter 2 of Division 1 of the California Code of Regulations

Dear Ms. Mora,

I am providing comment on behalf of myself and Enterprise Partners Venture Capital, a Venture Capital firm founded in 1985 and located in San Diego. Our firm invests primarily in life science and technology companies Southern California.

The proposed regulatory action referenced above regarding disclosure of placement agent activities is of concern to us, because we have current and potential investors that are public pension funds in California. Regulatory actions by CalPERS could become the policy of all or many of the smaller pension funds within the state.

The area of concern is in the proposed definition of personnel who would be reportable as "placement agents". While the statute (Government Code section 7513.85) seems to clearly define a placement agent as someone who <u>is hired as</u> a solicitor or marketer, the proposed CalPERS regulations appear to broaden the definition and make it very unclear as to who must report. Since the proposed penalties for non-compliance are severe, the ambiguity is alarming to any firm that is uncertain of whether the regulations apply to them.

As a Controller of a venture capital firm, I provide due diligence information and correspond with potential investors. I am not a "person or entity hired, employed, engaged or retained by or acting on behalf of an External Manager or on behalf of another Placement Agent as a finder, solicitor, marketer, Consultant, broker or other intermediary to raise money or investments," and therefore clearly not subject to relation as a Placement Agent based on the first part of Section 559 (a)6. However, the second part of definition 6 describing those who are NOT placement agents, i.e., "A Placement Agent shall not include any employee, officer, director, equity holder, partner, member, or trustee of an External Manager who spends one-third or more of his or her time, during a calendar year, managing the assets controlled by the External Manager", creates ambiguity by introducing the almost indefinable term, "managing the assets". I could argue that

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858 731-0300

the time I spend in tracking our investments, reporting to investors, and much of the general administrative duties that I perform are part of our asset management. Therefore, I spent most of my time managing the assets of the firm, but it would be very hard to quantify. If none of my duties are considered managing assets, because I have no decision-making authority, am I defined a placement agent?

In reviewing the background of the placement agent issue and available documents, it does not appear that the intent of the legislation or even the proposed regulation is to compel venture capital firms to report the compensation of their finance and support staff. It is safe to say that most venture capital employees would vigorously object to disclosure of their personal information. Therefore, I respectfully request the language of the final regulation be clarified to more specifically define Placement Agent. Simply stating that a placement Agent is a person or firm hired or employed for the primary purpose of raising funds would greatly clarify the regulation and align the language of the regulation to the statute. The attempt to define who is not a placement agent only adds confusion.

If our firm did hire a person as an employee whose primary purpose was to market or raise funds, we would not be opposed to disclosing this relationship to CalPERS, if CalPERS were to consider an investment in a Enterprise Partners fund.

Thank you for your consideration of these comments. I am happy to discuss the issue further by phone at (858) 731-0218 or email at yrsa@epvc.com.

Sincerely,

Yrsa Nordlicht
Controller

MISSION
VENTURES

Robert F. Kibble
Managing Partner

David J. Ryan
Managing Partner

Ted Alexander
Managing Partner

Leo S. Spiegel
Managing Partner

June 14, 2010

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RE: CalPERS, Notice of Proposed Regulatory Action: Proposed Addition of Section 559. Disclosure of Placement Agent fees, gifts and Campaign Contributions to Article 2 of Chapter 2 of Division 1 of the California Code of Regulations

Dear Ms. Mora,

I am providing comment on behalf of myself and Mission Ventures, a Venture Capital firm founded in 1996 and located in San Diego. Our firm invests primarily in technology companies Southern California.

The proposed regulatory action referenced above regarding disclosure of placement agent activities is of concern to us, because we have current and potential investors that are public pension funds in California. Regulatory actions by CalPERS could become the policy of all or many of the smaller pension funds within the state.

The area of concern is in the proposed definition of personnel who would be reportable as "placement agents". While the statute (Government Code section 7513.85) seems to clearly define a placement agent as someone who is hired as a solicitor or marketer, the proposed CalPERS regulations appear to broaden the definition and make it very unclear as to who must report. Since the proposed penalties for non-compliance are severe, the ambiguity is alarming to any firm that is uncertain of whether the regulations apply to them.

As a CFO of a venture capital firm, I provide due diligence information and correspond with potential investors. I am not a "person or entity hired, employed, engaged or retained by or acting on behalf of an External Manager or on behalf of another Placement Agent as a finder, solicitor, marketer, Consultant, broker or other intermediary to raise money or investments," and therefore clearly not subject to relation as a Placement Agent based on the first part of Section 559 (a)6. However, the second part of definition 6 describing those who are NOT placement agents, i.e., "A Placement Agent shall not include any employee, officer, director, equity holder, partner, member, or trustee of an External Manager who spends one-third or more of his or her time, during a calendar year, managing the assets controlled by the External Manager", creates ambiguity by introducing the almost indefinable term, "managing the assets". I could argue that the time I spend in tracking our investments, reporting to investors, and much of the general administrative duties that I perform are part of our asset management. Therefore, I spent most of my time managing the assets of the firm, but it would be very hard to quantify. If none of my duties are considered managing assets, because I have no decision-making authority, am I defined a placement agent?

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If our firm did hire a person as an employee whose primary purpose was to market or raise funds, we would not be opposed to disclosing this relationship to CalPERS, if CalPERS were to consider an investment in a Mission Ventures fund.

Thank you for your consideration of these comments. I am happy to discuss the issue further by phone at (858) 350-2100, ext. 170 or email at caroline@missionventures.

Sincerely,

Caroline A. Barberio
Chief Financial Officer

Keith Paul Bishop
Kbishop@post.harvard.edu
(949) 338-1729

Via email

Marte Castaños
Senior Staff Counsel
California Public Employees Retirement System

Dear Mr. Castaños:

I have the following comments with respect to the proposal of the California Public Employees Retirement System ("CalPERS") to adopt a rule implementing AB 1584. While I support CalPERS' decision to follow the rulemaking provisions of the California Administrative Procedure Act, the Notice of Proposed Regulatory Action is deficient in a number of respects and the proposed rule fails to meet the applicable standards of the California Administrative Procedure Act.

By letter dated October 19, 2009, I petitioned CalPERS to adopt regulations pursuant to Government Code §§ 11340.6 and 11340.7. CalPERS, however, did not respond to my petition within the time period required by law. In my petition, I pointed out that AB 1584 requires that CalPERS implement a rule by June 30, 2010. Thus, I strongly urged CalPERS to begin the rulemaking process as soon as possible. Thereafter I repeatedly urged CalPERS to begin the process so that it could adopt regulations by the prescribed deadline. Although I was advised in writing by the CalPERS Executive Officer that the process was expected to begin by January 30, 2010, CalPERS in fact did not initiate the process until much later. Even then, CalPERS failed to comply with the notice requirements of the Administrative Procedure Act and the deadline for comments had to be extended. The result is, as I had warned CalPERS last October, that in all likelihood CalPERS will not have adopted regulations within the time period required by law.

Comments Regarding the Notice of Proposed Regulatory Action

1. The Notice of Proposed Regulatory Action does not cite the proper authority and does not include all required references.

Government Code § 11346.5(a)(2) requires that the Notice of Proposed Regulatory Action include: (i) a reference to the authority under which the regulation is being proposed; and (ii) reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific. CalPERS cites only Cal. Const. Art. XVI, § 17 as authority in its Notice of Proposed Regulatory Action. However, nothing in that section grants CalPERS the authority to adopt regulations. However, I do believe that CalPERS has the statutory authority to adopt a regulation with respect to disclosure of payments to placement agents pursuant to Government Code § 7513.85(a). Accordingly, the Notice of Proposed Regulatory Action should be revised to delete the reference to Cal. Const. Art. XVI, § 17 and to add Government Code § 7513.85(a) as authority. The CalPERS' notice also fails to reference all codes sections that are being implemented by the proposed rule. The notice should refer to Government Code §§ 7513.8, 7513.85 & 7513.9.

3. The Notice of Proposed Regulatory Action wrongly states that the proposed rule will not impact costs for any state agency.

CalPERS asserts in the Notice of Proposed Regulatory Action that the proposed rule does not impact costs for any state agency. This assertion is simply not credible. CalPERS will necessarily incur additional costs associated with the following activities under the proposed rule:

- receipt and review of disclosure forms;
- review of forms;
- preparation, printing and of monthly reports;
- compliance with the California Information Practices Act; and
- compliance with the California Public Records Act.

These costs will take the form of personnel time, supplies and storage. Additionally, it is likely that the Attorney General will incur additional costs associated with enforcement of the proposed rule. Government Code § 11346.5(a)(6) requires that these estimated costs be included in the Notice of Proposed Regulatory Action. The Notice of Proposed Regulatory Action should be revised to include estimated costs to both CalPERS and the Attorney General as required.

4. The Notice of Proposed Regulatory Action wrongly states that CalPERS is not aware of the cost impacts on representative private persons or businesses.

CalPERS asserts in the Notice of Proposed Regulatory Action that it is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Because the rule requires private persons or businesses to provide certain disclosures and to update those disclosures, it is quite obvious that compliance will impose costs on private persons or businesses. The Notice of Proposed Regulatory Action should be revised accordingly.

5. CalPERS has not provided evidence that it has complied with Government Code § 11346.4.

On February 17, 2009, I submitted a written request for notice of regulatory action to CalPERS . However, CalPERS failed to mail to me a copy of the Notice of Proposed Regulatory Action as required by Government Code § 11346.4(a)(1). Although CalPERS did provide me with a copy of the notice after I requested one, CalPERS failed to send me copy of the Notice of Rescheduled Public Hearing, Extension of Written Comment Period and Revised Initial Statement of Reasons.[1] On April 15, 2010, I submitted a request pursuant to the California Public Records Act for a copy of the mailing list used by CalPERS. CaLPERS has failed to respond to my request and has also failed to respond to my request that it confirm that it mailed a copy of the Notice of Proposed Regulatory Action to a representative number of small business enterprises as required by Government Code § 11346.4(a)(3). CalPERS accordingly should demonstrate that it has complied with these requirements.

6. <u>The Notice of Proposed Regulatory Action fails to provide a citation to the comparable federal regulation and a brief description of the differences</u>.

Government Code § 11346.5(a)(3)(B) requires that the Notice of Proposed Regulatory Action include a citation of the comparable federal regulations and a brief description of the differences. The proposed regulations would require disclosure of payments to placement agents. The United States Securities and Exchange Commission has adopted Rule 206(4)-3 under the Investment Advisers Act of 1940 that requires disclosure of compensation arrangements between federally registered investment advisers and solicitors. The Notice of Proposed Regulatory Action should be amended to describe Rule 206(4)-3 and the differences between that rule and the rule proposed by CalPERS.

7. <u>The Notice of Proposed Regulatory Action incorrectly states that the CalPERS Board of Administration proposes to amend regulations</u>.

The Notice of Proposed Regulatory Action incorrectly states (at least twice) that the CalPERS Board of Administration proposed to *amend* regulations whereas it is clear that CalPERS is proposing to *adopt* a new regulation. The Notice of Proposed Regulatory Action should be revised to state that CalPERS is proposing to adopt a regulation.

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[1] I advised CalPERS that I was willing to waive its initial failure to provide me with a copy of the Notice of Proposed Regulatory Action but could not waive its failure to comply with the Government Code with respect to third parties. Moreover, I have not waived CalPERS' failure to provide me with a copy of the revised notice. Finally, it appears that CalPERS failed to post the initial Notice of Proposed Regulatory Action on its website as required by Government Code § 11346.4(a)(6) until I brought this deficiency to its attention. I note that CalPERS eventually filed the required materials on April 29, 2010, two weeks after I had notified them of this deficiency.

Comments Regarding the Proposed Rule Text

1. The proposed rule text does not include the required statement of authority and reference.

Government Code § 11346.2(a)(2) requires CalPERS to include a notation following the express terms of the proposed rule. This notation must list: (i) the specific statutes or other provisions of law authorizing the adoption of the regulation; and (ii) the specific statutes or other provisions of law being implemented, interpreted, or made specific. Although CalPERS includes a statutory citation in a "note" following the proposed rule, CalPERs fails to indicate whether this is included as authority or reference. As explained above, Government Code § 7513.85(a) should be cited as authority and Government Code §§ 7513.8, 7513.85 & 7513.9 should be cited as "reference". The proposed text of the rule should be revised to include the statutorily required notation.

2. The proposed definition of "Consultant" violates the clarity standard for regulations.

The proposed rule defines consultant to include "Key Personnel" of Consultant firms who are contractually retained or have been appointed to a pool by CalPERS to provide investment advice to CalPERS but who do not exercise investment discretion. A regulation is required to be written so that the meaning of regulations will be easily understood by those persons directly affected. Government Code § 11349 & 11349.1(a)(1). The term "Key Personnel" is susceptible to a variety of interpretations. For example, does it refer to officers, employees or other others? Because the proposed rule is reasonably and logically susceptible to different interpretations, it violates the "clarity" requirement. 1 CCR § 16(a)(1). The proposed rule should be modified to define "Key Personnel".

3. The proposed definition of "Placement Agent" violates the clarity standard for regulations.

The proposed definition of "Placement Agent" includes a reference to "Consultant" as someone hired by the External Manager. However, the proposed rule defines "Consultant" as someone who is appointed by CalPERS. The proposed rule should be redrafted to exclude the reference to "Consultant" in the definition of "Placement Agent".

4. The proposed requirement that disclosures be made by "any employee actively providing placement agent services" violates the clarity standard.

The proposed rule would require the disclosure of resume information with respect to Placement Agents. When a Placement Agent is an entity, the proposed rule would require this information to be provided by, among others, any employee actively providing placement agent services. It is unclear whether this would require disclosure with respect to clerical and other "back office" employees of the Placement Agent. The proposed rule should be revised to clarify the scope of this requirement.

5. The requirement that information must be updated within 14 calendar days of the date when the External Manager should have known of the change in the information violates the clarity standard.

The proposed requirement that the External Manager provide updates within 14 calendar days of when the External Manager should have known of the change in the information is unclear. The proposed rule should make it clear that this rule imposes an objective standard by requiring such disclosure when the External Manager reasonably should have known.

6. The proposed rule incorrectly assumes that Placement Agents must be registered with the Securities and Exchange Commission, the Financial Industry Regulatory Authority, or the Commodity Futures Trading Commission.

The proposed rule states that CalPERS may decline to retain or invest an External Manager if the Placement Agent is not registered with the Securities and Exchange Commission, the Financial Industry Regulatory Authority or the Commodity Futures Trading Commission. The Securities and Exchange Commission requires registration of, among other, some investment advisers and some securities brokers. In the case of investment advisers, regulation is divided between the states and the federal government based on the amount of assets under management. The proposed rule appears to be attempting to address two different situations: (i) placement agents used by investment managers retained by CalPERS; and (ii) placement agents used by investment vehicles in which CalPERS makes investments. In the former case, solicitors for federally registered investment advisers are not required to be registered as investment advisers. In the case of the latter, solicitors for the fund manager may not be required to be registered as securities brokers. Accordingly, the proposed rule is not consistent with law.

7. CalPERS does not have authority to impose the remedies specified in the proposed rule.

The proposed rule requires that the final agreement with CalPERS include specified remedies. However, Government Code § 7513.85(a) grants CalPERs the authority to adopt a policy "requiring the disclosure of payments". It does not grant CalPERS the authority to adopt regulations imposing a penalty. Therefore, the proposed rule violates the authority standard. In addition, the proposed requirement that the External Manager pay the greater of any management or advisory fees paid by CalPERS for the prior two years or the amount paid to the Placement Agent constitutes an unlawful penalty. These remedies bear no reasonable relationship to the actual damages that CalPERS could anticipate flowing from a breach of the contract.[2] Further, by requiring that this damage measure be included in all contracts, the measure of damages does not represent the parties' estimate of the range of damages. Thus, the proposed rule also violates the consistency standard for regulations.

8. The disclosure forms proposed by CalPERS must be adopted as regulations in accordance with the rulemaking provisions of the California Administrative Procedure Act.

CalPERS has create two forms but has not included these forms as part of the proposed rule. Although Government Code § 11340.9 establishes a limited exemption for forms, these forms are not exempt because they add language to the existing legal requirements and thus constitute a regulation within the meaning of the California Administrative Procedure Act. Accordingly, CalPERS may not require these forms unless it complies fully with the rulemaking provisions of the California Administrative Procedure Act.

9. The proposed rule is not consistent with the California Public Records Act and the California Information Practices Act.

The California Information Practices Act requires that whenever an agency collects personal information on a form, it must provide notice specified in Civil Code § 1798.17. The proposed forms require "personal information" about an individual as defined in Civil Code § 1798.3(a) (*e.g.*, name and employment history). Accordingly, the proposed rule and form violate the consistency requirement set forth in Government Code § 11349(d).

The proposed rule also purports to designate all information (except the proposed monthly reports) as subject to disclosure under the California Public Records Act. However, the California Information Practices Act generally prohibits disclosure of personal information. *See* Civil Code § 1798.24. Accordingly, the proposed rule is not consistent with law. In addition, CalPERS fails to cite any exemption from disclosure under the Public Records Act for the monthly monitoring reports. Accordingly the proposed rule is not consistent with law insofar as it would exempt monthly reports from disclosure under the Public Records Act.

Very Truly Yours,

Keith Paul Bishop

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[2] The fact that the proposed rule requires that CalPERS not pay the compensation of the Placement Agent makes it abundantly clear that a penalty based on the compensation paid by the External Manager does not represent CalPERS' actual damages.